IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1427

DON ROSS and MICHAEL ZABARAC,
Petitioners,

vs.

IRVIN SWARTZBERG, et al.,
Respondents.

From the:
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois
Cause No. 78-1629

On Appeal From:
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
Number: 77-C-3227
Honorable FRANK J. MCGARR, *Judge Presiding*

BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED FOR REVIEW.

Whether, under Rule 41(b) of the Federal Rules, a district court's dismissal of a prior complaint for failure to state a claim

operates as an adjudication upon the merits and has *res judicata* effect upon virtually identical allegations made by the same plaintiffs against the same defendants in a subsequently filed complaint.

COUNTER-STATEMENT OF THE CASE.

Plaintiffs-petitioners' statement of the case contains incorrect and irrelevant assertions compelling defendants-respondents to restate the facts of the case.

Plaintiffs filed the instant two-count complaint in the District Court for the Northern District of Illinois (Case No. 77 C 3227) seeking to enforce the liability of officers and directors for alleged misuse of corporate funds. (A. 25.)[1] The defendants moved to dismiss the complaint on the grounds that a previous decision rendered in the same District Court by the Honorable Prentice H. Marshall (Case No. 75 C 4402) was *res judicata* of the merits of plaintiffs' subsequent complaint. (Record, Item No. 4.)

Judge Marshall had dismissed plaintiffs' prior seven-count complaint filed against the same defendants characterizing that complaint as "discursive, disjointed and unintelligible". (A. 20.) Judge Marshall held:

> "It does not state a claim under which plaintiffs will be entitled to relief." (A. 22.)

Plaintiffs then appealed from Judge Marshall's ruling and the Court of Appeals for the Seventh Circuit dismissed plaintiffs' appeal. (A. 23.) No petition for a writ of certiorari to this Court was filed.

Plaintiffs simply then refiled virtually the identical[2] Counts IV and VI of the prior complaint as the two-count present

1. Citations are either to Petitioners' Appendix filed with their petition or to the record items themselves.

2. Both the District Court and the Appellate Court found the two counts of the instant complaint to be essentially identical to Counts IV and VI of the prior complaint (A. 41, A. 44) and

(Footnote continued on next page.)

complaint. (A. 25.) The Honorable Frank J. McGarr, treating defendants' motion to dismiss as a motion for summary judgment, granted summary judgment on both counts. (A. 37.) Judge McGarr held, relying on the authority of Rule 41(b) of the Federal Rules of Civil Procedure, that since Judge Marshall had not specified that his dismissal was without prejudice, the previous dismissal operated as an adjudication upon the merits of plaintiffs' claim. (A. 41.)

Plaintiffs appealed and Judge McGarr's decision was affirmed from the bench by the Seventh Circuit Court of Appeals. (A. 43.)

ARGUMENT.

The Question Presented for Review Is Insubstantial.

The sole question which plaintiffs seek this Court to review is whether a district court's dismissal of a complaint for failure to state a claim operates as an adjudication upon the merits and is *res judicata* of a subsequent complaint by the same plaintiffs, against the same defendants, containing virtually identical allegations.

Plaintiffs contend that for an involuntary order of dismissal to have a *res judicata* effect on a virtually identical subsequently filed complaint, the order dismissing the prior complaint must have specified that it was entered with prejudice.

Plaintiff's contention however is obviously erroneous in light of the plain language of Rule 41(b) of the Federal Rules of Civil Procedure. Rule 41(b) states:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal

(Footnote continued from preceding page.)

plaintiff did not on appeal to the Appellate Court seek to distinguish Counts IV and VI of the former complaint (No. 75 C 4402) from the instant two count complaint (No. 77 C 3227) and have not sought to distinguish the two complaints to this Court. Apparently the patently repetitious nature of the instant complaint is no longer at issue.

not provided for in this Rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

It is thus clear that where an order does not otherwise specify, Rule 41(b) renders the order of dismissal a dismissal with prejudice which in turn operates as an adjudication upon the merits unless the dismissal is for lack of jurisdiction, improper venue, or failure to join a party under Rule 19. The effect of Rule 41(b) in this regard has been unanimously affirmed in numerous decisions which have all held that where a dismissal of a complaint does not specify to the contrary it operates as an adjudication on the merits and is *res judicata* of the same allegations in a subsequent complaint. *See e.g., Hall* v. *Tower Land and Investment Company*, 512 F. 2d 481, 483 (5th Cir. 1975); *Rinehart* v. *Locke*, 454 F. 2d 313, 315 (7th Cir. 1971); *Glick* v. *Ballentine Produce, Inc.*, 397 F. 2d 590, 593 (8th Cir. 1968); *Ma Chuck Moon* v. *Dulles*, 237 F. 2d 241, 242 (9th Cir. 1956), *cert. denied*, 352 U. S. 1002, 77 S. Ct. 559; *Bowles* v. *Biberman Bros.*, 152 F. 2d 700, 701 (3rd Cir. 1945).

There are no decisions which have held otherwise. Indeed, it is clear that a contrary decision would be patently wrong in that it would in effect sanction the review by one district court judge of the decision of another. This was recognized by Judge McGarr in his ruling wherein he states:

> "Nothing in Judge Marshall's order specifies that the dismissal was without prejudice. Judge Marshall characterized plaintiff's complaint as 'unintelligible'. Yet he was obviously apprised of the allegations of Counts IV and VI of the complaint which are essentially the same as Counts I and II of the complaint before this court in the instant litigation. We find no essential element in the present complaint which was not contained in the complaint before Judge Marshall. Indeed, if the previous complaint were dismissed for lack of some necessary allegation of the complaint and that allegation were contained in the present complaint, the previous dismissal for failure to state a claim would not be *res judicata* of the present complaint. *See* Comment c, § 50, Restatement, Judgments; *see also Rinehart* v. *Locke*, 454 F. 2d 313 (7th Cir. 1971)."

In other words, once Judge Marshall examined the plaintiffs' complaint and found that it failed to state a cause of action, it is obvious that Judge McGarr is precluded from examining a part of the same complaint and now finding that it does state a cause of action. The sole question presented for review is thus clearly insubstantial.

Plaintiffs in their petition for certiorari argue that there is substantial merit to the factual allegations of their complaint. The substantive merits of plaintiffs' complaint however are not even remotely relevant to this appeal.[3] Plaintiffs also cite *Gilbert* v. *Braniff International Corp.*, 579 F. 2d 411 (7th Cir. 1978) in an attempt to argue that there is a conflict between the Appellate Court decisions. But as we have seen no such conflict exists. Moreover, *Gilbert* was decided under state procedural rules[4] and not under Rule 41(b) and anyway, in *Gilbert*, the order of dismissal specifically granted plaintiffs 28 days in which to amend. *Id.* at 413.

Having failed to perfect an appeal in the prior case (Case No. 75 C 4402), plaintiffs may not skirt the *res judicata* effect of the prior dismissal by merely instituting a new action with the refiling of the prior complaint.

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3. Plaintiffs' scattered efforts to argue the facts which form the basis of their complaint do not require a response in this brief. The issue is not whether plaintiffs can state or have stated a claim for which relief can be granted, but whether a prior decision of a district court on that precise point bars its re-litigation now. *See Rinehart* v. *Locke, supra.*

4. Ill. Supreme Court Rule 273 (Ill. Rev. Stat. Ch. 110A § 273).

CONCLUSION.

For the reasons set forth above, plaintiffs' petition for a writ of certiorari is totally devoid of any merit, and there is no reason for this court to grant certiorari in the present case.

Respectfully submitted,

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